

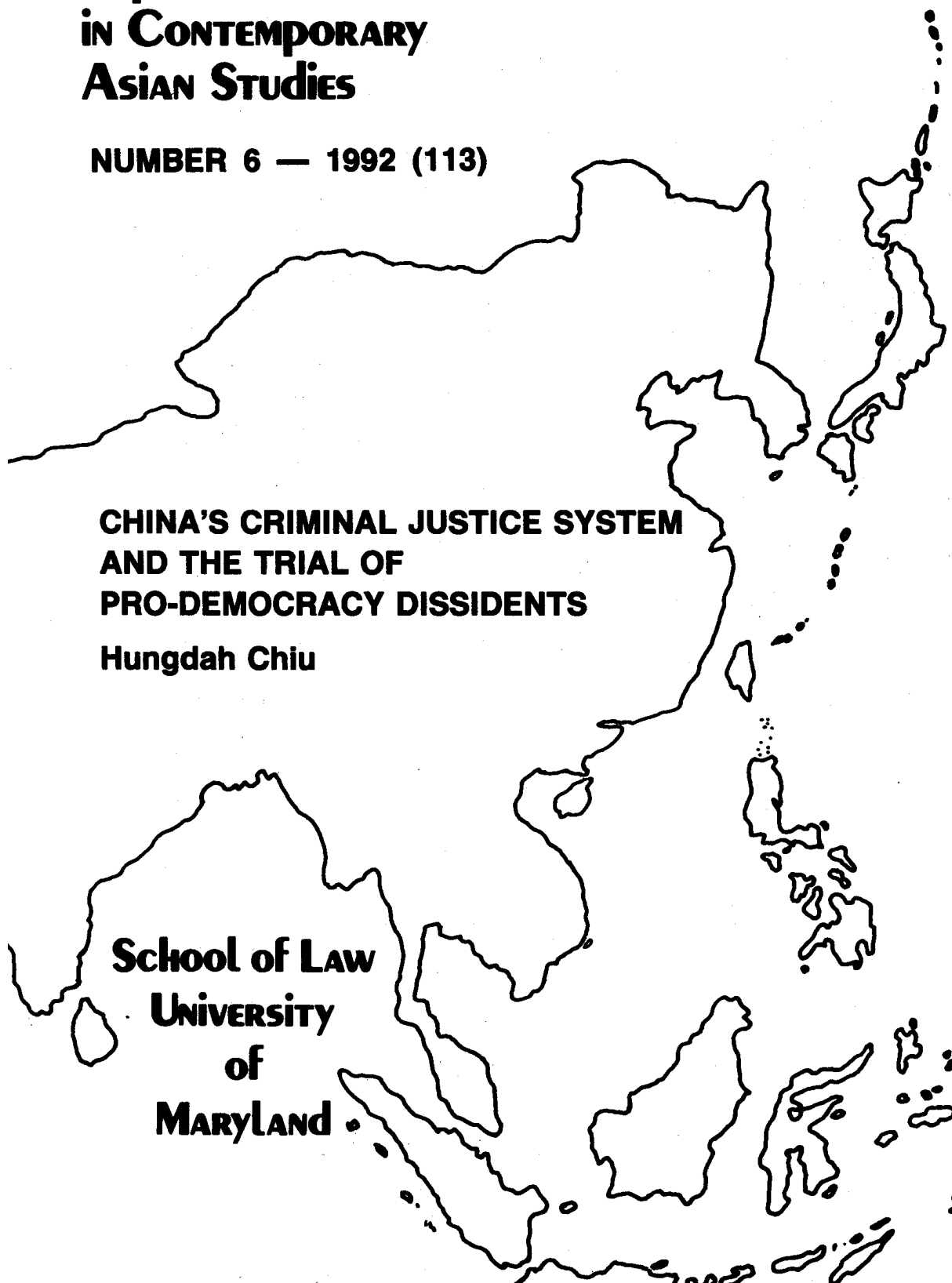
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**CHINA'S CRIMINAL JUSTICE SYSTEM
AND THE TRIAL OF
PRO-DEMOCRACY DISSIDENTS**

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Hungdah Chiu

TABLE OF CONTENTS

	<i>Page</i>
I. The Nature of the Chinese Criminal Justice System	1 [1181]
II. Defining a Criminal Act	2 [1182]
III. Criminal Process	4 [1184]
A. Arrest and Detention	4 [1184]
B. Interrogation	6 [1186]
C. Prosecution and Sentencing	7 [1187]
D. Simplified Process	8 [1188]
IV. Administrative Sanctions	9 [1189]
A. Sanctions Imposed by the Police	9 [1189]
B. Reeducation Through Labor	10 [1190]
C. Shelter and Investigation	11 [1191]
D. Number of People Under Administrative Sanctions	11 [1191]
V. The Role of Lawyers	12 [1192]
VI. The June 4, 1989 Tiananmen Massacre and Subsequent Arrests and Trials of Pro-Democracy Dissidents	14 [1194]
VII. Conclusion	20 [1200]

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CHINA'S CRIMINAL JUSTICE SYSTEM AND THE TRIAL OF PRO-DEMOCRACY DISSIDENTS

HUNGDAH CHIU*

I. THE NATURE OF THE CHINESE CRIMINAL JUSTICE SYSTEM

Mao Zedong, who established the People's Republic of China (PRC) in 1949, once said: "The state apparatus such as the army, police, and courts consists of instruments by which classes oppress classes. To the hostile classes the state apparatus is the instrument of oppression. It is violent, and not 'benevolent.'"¹ Under Mao's theory of law, it seems clear that those principles of justice generally recognized by non-communist countries, such as the independence of the judiciary, the presumption of innocence of the accused, and the equality of all persons before the law, have no place in the PRC legal system. The first two principles would be inconsistent with the view that law is an instrument of state policy, while the third would be inconsistent with the class nature of law.

The criminal justice system that was built on this theory during the Maoist period (1949-1976) was unique—it had neither a criminal code nor a criminal procedure code, and lawyers were virtually non-existent.² Judges were not required to have had legal training, nor were they required or expected to cite legal provisions in rendering judgments.³ The basic principle of criminal justice was the so-called "lenien[cy] with those who confess and sever[ity] with those

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1. Mao Tse-tung, *On the People's Democratic Dictatorship*, RENMIN RIBAO [PEOPLE'S DAILY], July 1, 1949, translated in JEROME A. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION* 73 (1968) (address in commemoration of the 28th anniversary of the Communist Party of China).

2. See SHAO-CHUAN LENG & HUNGDAH CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA, ANALYSIS AND DOCUMENTS* 12 (1985).

3. See *id.*

who resist.”⁴ Anyone who refused to accept the charges would be severely punished, and any attempt to appeal a guilty sentence would most likely result in a more severe sentence.

The above theory of law and practice prevailed until Mao’s death in 1976. Since then, the new leadership has tried to modify some aspects of Mao’s theory of law and to establish a more stable legal system.⁵ However, article 2 of the 1979 Chinese Criminal Law still provides that “[t]he tasks of the Criminal Law of the People’s Republic of China are to use criminal punishments to fight against all counter-revolutionary and other criminal acts in order to defend the system of the dictatorship of the proletariat.”⁶

II. DEFINING A CRIMINAL ACT

The Criminal Law enacted in 1979 has a total of 192 articles and specifies the types of acts subject to criminal sanctions.⁷ It narrows the definition of a counterrevolutionary that had previously prevailed in the Mao period by stressing that such a person must have committed some overt act; thus, under this law, mere thoughts against the dictatorship of the proletariat and the socialist system may no longer be considered criminal offenses.⁸ However, some criminal provisions still contain vague definitions of the kinds of conduct that come within their reach. For instance, articles 116, 117, and 121 provide penalties for “serious” violations of customs, foreign exchange, tax, and other regulations.⁹ These penalties are to be imposed in addition to the administrative sanctions provided by the regulations them-

4. *See id.* at 19.

5. *See generally* LENG & CHIU, *supra* note 2 (providing a study of the post-Mao Chinese legal system).

6. Criminal Law of the People’s Republic of China, art. 2 (1979), *reprinted in* LEGISLATIVE AFFAIRS COMM’N OF THE STANDING COMM. OF THE NAT’L PEOPLE’S CONGRESS OF THE PEOPLE’S REPUBLIC OF CHINA, *THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA 1979-1982*, at 89 (1987) [hereinafter *Criminal Law*].

7. Hungdah Chiu, *Socialist Legalism: Reform and Continuity in Post-Mao People’s Republic of China*, 1982 OCCASIONAL PAPERS/REPRINTS SERIES CONTEMP. ASIAN STUD. 1, 15.

8. *Id.*

9. Criminal Law, *supra* note 6, arts. 116-17, 121.

selves, but nowhere does the law define the term "serious." The law also provides a wide range of penalties that can be imposed for offenses.¹⁰ Thus, a court may punish corruption with anything from a six-month detention period to the death penalty.

The most serious defect of the 1979 Chinese Criminal Law is its retention of the analogy principle found in the 1951 Counterrevolutionary Act.¹¹ Article 79 of the Criminal Law provides:

Crimes that are not expressly defined in the Specific Provisions of this Law may be determined and punished according to whichever article in the Specific Provisions of this Law that covers the most closely analogous crime, but the judgment shall be submitted to the Supreme People's Court for approval.¹²

This analogy principle conflicts with one of the basic maxims of criminal justice: *nullum crimen sine lege* (no crime in the absence of a preexisting law making the act a crime), which is also incorporated in article 11, paragraph 2, of the 1948 Universal Declaration of Human Rights.¹³

Articles 90 through 104 of the Criminal Law deal with "Crimes of Counterrevolutionaries."¹⁴ These offenses, ranging from treason and espionage to "propagandizing for and inciting the overthrow of the political power of the dictatorship of the proletariat and socialist system, through counterrevolutionary slogans, leaflets or by other means" are defined in such broad and vague terms that procurators and the courts may arbitrarily interpret them. These articles have been used to charge persons who are guilty of nothing

10. For details, see Werner Pfennig, *Political Aspects of Modernization and Judicial Reform in the PRC*, 1 J. CHINESE STUD. 1, 91-97 (1984).

11. Article 16 of the Act of the PRC for Punishment of Counterrevolution provides: "Those who, with a counterrevolutionary purpose, commit crimes not covered by the provisions of this Act may be given punishments prescribed for crimes [enumerated] in this Act which are comparable to the crimes committed." COHEN, *supra* note 1, at 302.

12. Criminal Law, *supra* note 6, art. 79.

13. This paragraph states: "No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law." G.A. Res. 217, U.N. Doc. A/810, at 71, 73 (1948).

14. See Criminal Law, *supra* note 6, arts. 90-104.

more than the open expression of their views, despite constitutional guarantees of this freedom.¹⁵ They have also been used to punish persons who have organized demonstrations, disrupted traffic, disclosed official information to foreigners, or formed associations outside state control.

III. CRIMINAL PROCESS

While there are four levels of courts, i.e., basic, intermediate, higher, and supreme people's courts,¹⁶ a defendant has the right to appeal only once.¹⁷ For instance, a decision of an intermediate people's court can only be appealed to a higher people's court. The only exception is for death sentences, which must be sent to the Supreme People's Court for final approval.¹⁸ However, since 1983, the Supreme People's Court has been authorized to allow the higher people's courts to approve the death penalty in cases of murder, rape, robbery, and illegal use of explosives as well as in other cases that seriously endanger public security and social order.¹⁹

A. Arrest and Detention

The pretrial proceedings of the Chinese criminal process are composed of two principal parts: arrest and detention, and investigation.²⁰ To prevent illegal arrests and prolonged detentions, the 1979 Criminal Procedure Law of the People's Republic of China²¹ and the 1979 Arrest and Detention Regulations of the People's Republic of China²² set

15. See XIANFA [Constitution] art. 35 (1982) (noting that citizens of the People's Republic of China enjoy freedom of speech, press, assembly, association, process, and demonstration).

16. See Criminal Procedure Law of the People's Republic of China, 1979, arts. 14-17, reprinted in LEGISLATIVE AFFAIRS COMM'N OF THE STANDING COMM. OF THE NAT'L PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 6, at 123-24 [hereinafter Criminal Procedure Law].

17. See *id.* arts. 129-43.

18. *Id.* art. 144.

19. See LENG & CHIU, *supra* note 2, at 110.

20. *Id.* at 87.

21. See Criminal Procedure Law, *supra* note 16, art. 44.

22. See Arrest and Detention Regulations of the People's Republic of China, 1979, art. 12, reprinted in LEGISLATIVE AFFAIRS COMM'N OF THE STANDING COMM. OF THE NAT'L PEOPLE'S CONGRESS OF THE PEOPLE'S RE-

up proper arrest procedures and strict time limits. In carrying out an apprehension or in making an arrest, the police must produce a warrant.²³ In accordance with article 5 of the Arrest and Detention Regulations, the family of the detainee or the arrestee should be notified of the reasons for the action and the place of confinement within twenty-four hours, "except where notification would hinder the investigation or there is no way to notify them."²⁴ Interrogation must start within twenty-four hours after any apprehension or arrest, and the detainee or the arrestee must be released immediately if no legitimate grounds are found upon which to hold the person.²⁵ When the public security organ formally declares a detainee "arrested," the matter must be submitted to the procuracy for approval within three days or, in special circumstances, seven days.²⁶ The procuracy must either sanction the arrest or order the release of the detainee within three days.²⁷ However, article 47 of the Criminal Procedure Law gives the procuracy the right to extend this deadline if supplementary investigations are needed in order to make a decision.²⁸ It is not clear whether the suspect should be released by the police under such circumstances.

During the investigation stage, the tasks for law enforcement officers include interrogation of the accused and witnesses, search and seizure of property, examination of evidence, and preparation of the indictment.²⁹ Mindful of past abuses, the Criminal Procedure Law stipulates that police, judges and procurators are strictly forbidden from extorting confessions by the use of torture, threats, enticement, deceit, or any other illegal means. This prohibition extends to the

PUBLIC OF CHINA, *supra* note 6, at 49 [hereinafter Arrest and Detention Regulations].

23. *See id.* art. 5; *see also* Criminal Procedure Law, *supra* note 16, art. 43.

24. *See* Arrest and Detention Regulations, *supra* note 22, art. 5.

25. *See* Criminal Procedure Law, *supra* note 16, art. 44; *see also* Arrest and Detention Regulations, *supra* note 22, art. 12.

26. *See* Criminal Procedure Law, *supra* note 16, art. 48; *see also* Arrest and Detention Regulations, *supra* note 22, art. 8.

27. *See* Arrest and Detention Regulations, *supra* note 22, art. 8.

28. Criminal Procedure Law, *supra* note 16, art. 47.

29. *See id.* arts. 62-104. The Criminal Procedure Law addresses the listed tasks as follows: interrogation, articles 62-70; search and seizure, articles 79-87; examination of evidence, articles 71-78; preparation of the indictment, articles 92-104.

collection of all kinds of evidence throughout the entire judicial process.³⁰ At the time of a search, except in emergency situations, investigators shall show the searched party a search warrant.³¹ The Criminal Procedure Law further provides that detention of an accused during investigation should not exceed two months.³² If necessary, a one month extension may be granted by the procuracy at the next higher level.³³ A procuracy is required to decide whether to prosecute a case sent to it by the police within one month to one and a half months.³⁴

B. *Interrogation*

The usual interrogation procedure, as described by many people, is very harsh. In order to create psychological pressure, a suspect is often unexpectedly awakened in the middle of the night to be interrogated. After each interrogation, the suspect must impress a fingerprint in red ink on each page of the record taken by the interrogator or clerk. After several interrogations, the interrogating officer asks the suspect to write his own account of the alleged crime(s) committed, i.e., a personal confession.³⁵ Torture and ill-treatment of prisoners persist as a widespread problem in China.³⁶ A 1987 study by Amnesty International, which was based primarily on published Chinese sources, found that "most torture victims are criminal suspects who are tortured to force them to confess" and "their torturers are usually police officers, or Communist Party officials, and members of the many informal security units who illegally detain individuals they suspect of committing crimes."³⁷

The most common methods of torture described in the Chinese press are severe beatings, usually with the victim bound or handcuffed, suspension by the arms, assault with

30. *See id.* art. 32.

31. *Id.* art. 81.

32. *See id.* art. 92.

33. *Id.*

34. *Id.* art. 97.

35. Information based upon interviews with former detainees (identities have been withheld for the protection of interviewees).

36. *See* AMNESTY INTERNATIONAL, CHINA: TORTURE AND ILL-TREATMENT OF PRISONERS 4 (1987).

37. *See id.* at 1.

instruments such as electric batons, whipping or striking victims with various objects, unspecified forms of humiliating or degrading treatment, and around-the-clock interrogation.³⁸ In addition to the use of torture to extract confessions, suspects are frequently detained under intolerable conditions.³⁹

C. *Prosecution and Sentencing*

Once a case is referred to the procuracy by the public security (police), there is a high likelihood that it will be prosecuted. According to the published statistics, between 1986 and 1988, 819 counterrevolutionary cases were prosecuted while only fifty-seven cases were dismissed.⁴⁰

Once a suspect is prosecuted, conviction is almost certain.⁴¹ The April 6, 1987 report of the Supreme People's Court to the National People's Congress revealed that only 0.7% of the suspects prosecuted were exonerated.⁴² The rationale for this high conviction rate stems from the failure to adopt a "presumption of innocence" into the 1979 Criminal Procedure Law. This presumption is provided for in article 11, paragraph 1 of the 1948 Universal Declaration of Human Rights and in article 14, paragraph 2 of the 1966 International Covenant on Civil and Political Rights.⁴³

In practice, most Chinese trials are essentially sentencing hearings at which the defense lawyers or representatives plead for leniency for their clients and, with few exceptions, do not contest the charges. Courts usually assume the guilt of any person brought to trial. Defendants may appeal both

38. *See id.* at 9.

39. *See id.* at 10.

40. *See* 1987 ZHONGGUO FALU NIANJIAN [LAW Y.B. CHINA] 884-85; 1988 LAW Y.B. CHINA 816-17; 1989 LAW Y.B. CHINA 1083-84.

41. *See* ZHONGHUA RENMIN GONGHEGUO ZUIGUO RENMIN FAYUAN GONGBAO [GAZETTE OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA], No. 2, 1987, at 4.

42. *See id.*

43. Article 11, paragraph 1 of the Universal Declaration states: "Everyone charged with a penal offense has the right to be presumed innocent until proven guilty." G.A. Res. 217, *supra* note 13, at 73. Article 14, paragraph 2 of the 1966 Political Covenant states: "Everyone charged with a criminal offense shall have the right to be presumed innocent until proven guilty according to law." International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14(2), 999 U.N.T.S. 171, 176.

verdicts and sentences to the next highest court.⁴⁴ Appeals can result in stiffer or reduced sentences for the accused. Although China has four court levels, it allows only one appeal.⁴⁵ Moreover, only in a few exceptional cases, such as certain death sentences, can an accused appeal to the Supreme People's Court.

The Chinese judiciary is nominally independent, but in reality it is controlled by the Chinese Communist Party. There is no legal sanction against a party committee's interference with judicial independence.⁴⁶ On the contrary, for serious or political cases, the procurators and the judges usually discuss the handling of these cases with the party committee at the same level.

D. *Simplified Process*

For certain offenses, the procedural guarantee provided in the Criminal Procedure Law and limits on punishment were revised by several resolutions of the Standing Committee of the National People's Congress (NPC).⁴⁷

On September 2, 1983, the NPC Standing Committee adopted a resolution to amend article 13 of the Organic Law of People's Courts, enacted by the NPC, to allow the Supreme People's Court to delegate the authority to approve death sentences to the provincial-level higher people's courts in cases of murder, rape, robbery, the use of explosives, and other serious offenses.⁴⁸ Another resolution of the NPC Standing Committee removed practically all guarantees of due process provided in the Criminal Procedure Law for persons accused of murder, rape, armed robbery, and other violent crimes.⁴⁹

The resolution rendered ineffective article 110 of the Criminal Procedure Law, which requires that defendants receive a copy of the indictment at least seven days before the

44. See LENG & CHIU, *supra* note 2, at 108.

45. See Criminal Procedure Law, *supra* note 16, arts. 129-43; see also LENG & CHIU, *supra* note 2, at 108.

46. See LENG & CHIU, *supra* note 2, at 98-104.

47. See *id.* at 110.

48. *Id.*

49. See *id.* at 110-11.

trial in order to prepare their defenses.⁵⁰ Furthermore, it shortened the time limit for an appeal to three days instead of the ten days stipulated in article 131 of the Criminal Procedure Law.⁵¹ In another resolution adopted on the same day, the NPC Standing Committee revised the Criminal Law enacted by the NPC. The revision increased sharply the number of capital offenses to cover virtually any serious crime and ordered the courts to impose stiffer penalties, including execution, on people convicted of violent crimes.⁵²

Under the amended Criminal Law and Criminal Procedure Law, a person charged with one of the violent or serious crimes could be executed within approximately eight days—an extremely short time for arrest, investigation, prosecution, sentencing, appeal, and execution.⁵³

IV. ADMINISTRATIVE SANCTIONS

A. *Sanctions Imposed by the Police*

A unique aspect of the Chinese criminal justice system is the imposition of administrative sanctions without judicial review. There are three types of administrative sanctions dealing with certain individuals alleged to be political or social deviants. The first one involves enforcement of the Security Administration Punishment Act. This Act, formalized in 1957,⁵⁴ allows the police to issue warnings, impose modest fines, and detain persons for up to fifteen days. The 1957 Act also allowed the police to use the principle of “analogy” to impose sanctions not specifically provided for in the Act.⁵⁵ Judicial review of a police decision was not possible. However, the Act was revised in 1986 to remove the analogy provision and also to subject police decisions to judicial review.⁵⁶

50. See Criminal Procedure Law, *supra* note 16, art. 110.

51. See *id.* art. 131.

52. LENG & CHIU, *supra* note 2, at 110.

53. AMNESTY INTERNATIONAL, CHINA, VIOLATIONS OF HUMAN RIGHTS, PRISONERS OF CONSCIENCE AND THE DEATH PENALTY IN THE PEOPLE'S REPUBLIC OF CHINA 69 (1984).

54. LENG & CHIU, *supra* note 2, at 235-48.

55. See *id.* at 248.

56. Zhonghua Renmin Gongheguo Falü Huibian 1986 [Collection of Laws of the People's Republic of China in 1986] 84-98 (1987). Article 39

B. *Reeducation Through Labor*

The second type of administrative sanction is reeducation through labor, formalized in the 1957 State Council's Decision on Reeducation Through Labor.⁵⁷ The Decision authorizes the police and civil administrative organs to send a wide range of offenders to special camps to work and reeducate themselves. The offenders include (1) people who have no decent occupation, who behave like hoodlums, and who engage in theft, swindling, and other antisocial conduct; (2) counterrevolutionaries and antisocial reactionaries not subject to criminal prosecution; (3) people who refuse to work or to comply with work assignments or transfer; and (4) troublemakers who refuse to correct themselves despite repeated criticism. Reeducation through labor is similar to reform through labor in many aspects. However, it is a non-criminal punishment not subject to court approval. Those assigned to reeducation are paid a salary according to their work and output.⁵⁸ The original decision fixed no specific length of time for reeducation. Thus the police could send "undesirable elements" to labor camps for an indefinite period.

In republishing the 1957 decision on November 29, 1979, the NPC Standing Committee also passed Supplementary Regulations Concerning Reeducation Through Labor⁵⁹ to make some improvements. First, special committees composed of public security, civil affairs, and labor officials were established for provinces, autonomous regions, and large and medium cities to direct and administer the work accomplished by reeducation through labor programs. The range of "admittance" was confined to those people in large and medium cities who need reeducation through labor. Second, the duration of reeducation through labor became more definite; it would last from one to three years with a possible extension for another year. Third, once they were released from the reeducation labor camps, the regulations assured that they would not be discriminated against in employment

of the revised Act provides for judicial review of the final decision of the public security organ. *Id.* at 96-97.

57. See LENG & CHIU, *supra* note 2, at 249-51.

58. See *id.* at 153.

59. *Id.* at 251-52.

or schooling. Fourth, the People's Procuratorates were required to exercise supervision over organs managing reeducation through labor programs. Finally, the State Council adopted a decision in February 1980 to curb the use of such administrative methods as "forced labor" and "taking in for investigation" by consolidating them with reeducation through labor.⁶⁰ Despite such improvements, an internal (unpublished) regulation enacted in 1982 by the Ministry of Public Security extended the scope of persons subject to this sanction by including undefined "anti-[Communist] Party elements" and "anti-socialist elements."⁶¹

Reports indicate that Chinese authorities have used this administrative measure to detain thousands of people, ranging from vagrants to political dissidents, in rural camps.⁶²

C. *Shelter and Investigation*

The third type of administrative sanction is the so-called "shelter and investigation" (*shourong shencha*) imposed by the police. This measure is based on an unpublished document entitled "Notice Concerning the Incorporation of the Forced Labor and the Shelter and Investigation into Reeducation Through Labor" which was issued by the State Council on an unknown date.⁶³ A published article states that people who commit minor offenses and whose identity, address or background are unclear, or who are suspected of having roamed from place to place committing crimes, or of forming criminal gangs, may be subjected to "shelter and investigation" by the police for one to three months.⁶⁴ The legal basis for this type of detention is not clear.

D. *Number of People Under Administrative Sanctions*

The exact number of people who are now placed under

60. *Id.* at 153.

61. Fu Ge, *The Theory and Practice of the Legislation on Reeducation Through Labor*, FAXUE, No. 7, 1987, at 44-45.

62. See AMNESTY INTERNATIONAL, CHINA, PUNISHMENT WITHOUT CRIME: ADMINISTRATIVE DETENTION 38-48 (1991).

63. See Wang Jian, *What Is Shelter and Investigation?*, ZHONGGUO FAZHI BAO, Aug. 30, 1986, at 1; see also AMNESTY INTERNATIONAL, *supra* note 62, at 5-14. Many political dissidents were detained under this administrative sanction. See *id.* at 15-19.

64. AMNESTY INTERNATIONAL, *supra* note 62, at 9.

various types of administrative sanctions is unascertainable since China publishes no statistics in this area. However, persons who were formerly subjected to such sanctions have claimed that there are at least several million.⁶⁵

V. THE ROLE OF LAWYERS

As they took over mainland China, the Chinese Communists abolished the legal system that existed prior to 1949 in China. The PRC tried to introduce "people's lawyers" to its judiciary in 1955. However, with the 1957 Anti-Rightists Campaign, the legal profession gradually disappeared.⁶⁶ Further, the Party policy of the Cultural Revolution period, that of dealing leniently with those who confess and severely with those who resist, strongly discouraged accused persons from even asserting a defense, and had the effect of emasculating the defense lawyer system.

The Constitution of 1978 restored the lawyer system. The 1982 Constitution also explicitly states in article 125 that "the accused has the right of defense."⁶⁷ In addition, the 1979 Criminal Procedure Law specifies that the accused may have, for his defense, a lawyer, relative, guardian, citizen recommended by a people's organization, or a citizen designated by the court in addition to his own advocacy.⁶⁸ The responsibility of a defender is, on the basis of the facts and the law, to present "materials and opinions proving the innocence of the defendant, the pettiness of his crime and the need for a mitigated punishment or exemption from criminal responsibility, thus safeguarding the lawful rights and interests of the defendant."⁶⁹

It should be noted here that no Chinese legislation provides for the right to counsel before trial. As stipulated by article 110 of the Criminal Procedure Law, defense counsel apparently becomes involved in a case only after the court

65. *See id.* at 15-19. A recent report indicates that there are 10 million people in Chinese prison/labor camps, but it is not clear how many are under administrative sanctions. *See* Charles Lane et al., *The Last Gulag*, *NEWSWEEK*, Sept. 23, 1991, at 26.

66. LENG & CHIU, *supra* note 2, at 72-73.

67. *See* XIANFA art. 125 (1982).

68. *See* Criminal Procedure Law, *supra* note 16, art. 26.

69. *Id.* art. 28.

has decided to "open a court session."⁷⁰ A Chinese lawyer would prepare for the defense by studying the relevant materials, and getting acquainted with the circumstances of the case. The lawyer would also interview and correspond with the defendant when permitted by the court. It must be noted that a Chinese lawyer has very limited time to prepare a defense for a criminal suspect. The court needs to send the indictment of the procuracy only seven days before the court hearing; therefore, a lawyer may have only seven days to prepare the defense.⁷¹ At trial, the defense lawyer has the right to question the prosecution's witnesses, experts, and the defendant, summon and question new witnesses, introduce new evidence and participate in courtroom debates. If necessary, he can also, with the consent of the defendant, lodge an appeal from the judgment and present his version of the case to the court of second instance.

The 1980 Interim Regulation on Lawyers states that a Chinese lawyer, in performing his functions, "shall serve the cause of socialism and the interests of the people, act on the basis of facts, and take the law as the criterion" and that the attorney is protected by the law from any organization or individual.⁷² According to Chinese writers, the defense counsel is not the defendant's agent in a criminal proceeding. He is an independent party in the litigation and is not bound by the will of the accused. He must carry out his activities within the legal framework and under no circumstances should he fabricate evidence, distort facts, or use deception to help his clients. If the evidence presented by the prosecution is incorrect in whole or in part, the lawyer should try to prove the innocence of the defendant or mitigate his guilt. If, on the other hand, the crime has been established beyond any doubt, then the counsel should defend the accused from the standpoint of certain extenuating circumstances, such as motives and means of the crime, the age of the defendant,

70. *Id.* art. 110.

71. *Id.*

72. See Interim Regulations of the People's Republic of China on Lawyers, art. 3., Aug. 26, 1980, reprinted in LEGISLATIVE AFFAIRS COMM'N OF THE STANDING COMM. OF THE NAT'L PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 6, at 177. The Interim Regulations of the People's Republic of China on Lawyers were adopted on August 26, 1980 and became effective as of January 1, 1982.

the degree of his repentance, or the objective reasons for the crime. The lawyer should not say anything detrimental to the defendant at the trial but must persuade the defendant to reveal to the court concealed facts to seek the leniency of the court. The purpose of the defense counsel is considered well-served if he can help the court to render a just verdict and protect the legitimate rights and interests of the defendant.⁷³

Under the 1980 Interim Regulation on Lawyers, all lawyers must be Chinese citizens who support the socialist system and have the right to elect officials and be elected (article 8).⁷⁴ This requirement precludes the possibility of foreign lawyers appearing in Chinese courts, handling legal cases, or acting as legal advisers to any Chinese organization or enterprise. However, the Chinese authorities do not interfere with foreign law firms establishing branches in China provided that they do not engage in these activities.

VI. THE JUNE 4, 1989 TIANANMEN MASSACRE AND SUBSEQUENT ARRESTS AND TRIALS OF PRO- DEMOCRACY DISSIDENTS

On June 4, 1989, the Chinese Communist government ordered its military forces to use tanks and machine guns to massacre participants in a peaceful student-led democracy movement at Beijing's Tiananmen Square. Several thousand participants perished.⁷⁵ This massacre was followed by a drastic, country-wide crackdown on participants, supporters, and sympathizers. Thousands were arrested, and some were reportedly secretly executed.⁷⁶ Those who were "detained"

73. LENG & CHIU, *supra* note 2, at 93.

74. See Interim Regulations of the People's Republic of China on Lawyers, *supra* note 72, art. 8.

75. This massacre was reported in almost all newspapers. For an extensive collection of media reports on this subject see F.B.I.S., DAILY REP., CHINA, June 5, 1989. See also Russell Watson et al., *Beijing Bloodbath*, NEWSWEEK, June 12, 1989, at 24-29; Jesse Birnbaum & Howard G. Chua-Eoan, *Despair and Death in a Beijing Square*, TIME, June 12, 1989, at 24-27; Russell Watson et al., *Reign of Terror*, NEWSWEEK, June 19, 1989, at 14-22.

76. See AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA, PRELIMINARY FINDINGS ON KILLINGS OF UNARMED CIVILIANS, ARBITRARY ARRESTS AND SUMMARY EXECUTIONS SINCE JUNE 3, 1989 (1989); see also Paul Lewis, *China Is Said to Execute Some in Secret*, N.Y. TIMES, Aug. 31, 1989, at A3.

or "arrested" by the Chinese authorities fell into four broad categories: (1) workers who organized or participated in independent labor organizations; (2) students who played key roles in the formation of groups such as the Beijing Students Autonomous Federation, the Autonomous Federation of Students from Outside Beijing, and numerous other independent campus organizations; (3) leading intellectual figures, journalists, Party theoreticians and college professors, whose public statements and writings were characterized by the Chinese government as "bourgeois liberal" hence thought to have laid the ideological basis for the pro-democracy movement termed the "counterrevolutionary rebellion" of June 3-4, 1989, by the Chinese authorities; and (4) an overwhelming number of ordinary workers and urban residents who, in a desperate attempt to protect the students in Tiananmen Square, physically confronted the military forces on the streets of Beijing on the night of the massacre, helped provide shelter to fugitive students and workers who had been placed on government wanted lists after the June 4 massacre, or participated in demonstrations throughout China to protest the massacre.⁷⁷

The worldwide condemnation of the massacre and the subsequent economic sanctions imposed by Western powers⁷⁸ shocked the Chinese government and placed it in a conundrum. If the government severely punished those who had participated in the pro-democracy movement, it would provoke the Western countries to stiffen their economic sanctions and thus cause severe economic difficulties for China. On the other hand, because the government had already labelled the student-led pro-democracy movement a "counterrevolutionary riot,"⁷⁹ it would be slapping its own face by releasing those it had placed under detention or arrest. Therefore, China simply detained large numbers of people involved in the pro-democracy movement in violation

77. See *Punishment Season, Human Rights in China After Martial Laws*, ASIA WATCH, Mar. 1990, at 16.

78. See, e.g., *U.S. Response*, FACTS ON FILE, June 9, 1989, at 411; *U.S. Suspends High-Level Contacts*, FACTS ON FILE, June 23, 1989, at 450; Edward Cody, *EC Hits "Brutal Repression" in China, 12-Nation Summit Joins U.S. in Sanctions, Addresses Mideast Issue*, WASH. POST, June 28, 1989, at A18.

79. See *Counter-Revolutionary Riot Quelled*, BEIJING REV., June 12-25, 1989, at 5.

of the time limit for detention and investigation provided in the Criminal Procedure Law—within seven days the public security (police) must release the detainee or convert his/her status from detention to arrest, at which time the procurators have up to three months to investigate the case.⁸⁰

Under Western economic sanction pressure China announced, in the first six months of 1990, that it had released 881 detainees and that 355 remained in pre-trial detention.⁸¹ Many observers believed that considerably more individuals were still under detention. Many of those released from detention were neither informed of the charges against them, nor apprised of the legal grounds upon which they had been detained in violation of the time limit provided by the Criminal Procedure Law.

In January 1991, the Chinese government announced the release of an additional sixty-nine dissidents held after the June 4, 1989 massacre. Among them, six were tried and convicted but “exempted from punishment,” eighteen were reportedly charged but released before trial, and forty-five were reportedly released without being charged.⁸² The cases against the remaining detainees posed a difficult problem for China—if the government was to have any chance of persuading the Western powers to end their economic sanctions, it had to close these cases.

Apparently taking advantage of the worldwide preoccupation with the Gulf War between the U.S.-led coalition and Iraq in January and February 1991, China quickly put the remaining dissidents on trial. Although it is believed that at least thirty-two detainees were put on trial, the official New China News Agency (NCNA) announced verdicts against only twenty-one of them on January 5, 26, and February 12, 1991.⁸³ All twenty-one defendants were convicted, but the NCNA reported that six of them were “exempted from crim-

80. See Criminal Procedure Law, *supra* note 16, arts. 50, 51, 92.

81. STAFF OF STATE DEP'T, 102D CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, at 848 (Comm. Print 1991).

82. AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA, TRIALS OF DISSIDENTS: SENTENCES AND RELEASES IN BEIJING I (1991).

83. *Lawbreakers Involved in Riots Sentenced*, F.B.I.S., DAILY REP., CHINA, Jan. 7, 1991, at 15; *Wang Dan, Seven Antigovernment "Offenders" Sentenced*, F.B.I.S., DAILY REP., CHINA, Jan. 28, 1991, at 24-25; *Further on Sentencing of Wong Juntao, Others*, F.B.I.S., DAILY REP., CHINA, Feb. 13, 1991, at 15.

inal punishment" and then released.⁸⁴ The fifteen others were sentenced to prison terms ranging from two to thirteen years.⁸⁵ The verdicts against eleven other defendants have not yet been announced. On March 20, 1991, a Chinese official told a delegation from the American Bar Association that all trials concerning the Tiananmen cases had been "basically completed."⁸⁶

Notwithstanding the Chinese government's best efforts to portray the trials as part of a fair, sophisticated system, the orientation of the trials was mainly political. Officially described as "open to the public," admission to the trials was in fact by ticket only. Despite repeated requests from international human rights groups and Chinese dissidents abroad, the Chinese government did not permit any outside party to observe the trials. Moreover, while NCNA asserted that teachers, students, and family members of the accused attended the trials, friends and family of the defendants were "often unable to determine when trials were scheduled, let alone attend them."⁸⁷

Except for that of Wang Juntao, the judgments in the following table have not been published in full. All other judgments are based on Chinese press releases.⁸⁸ Each of the defendants was charged with "plotting to overthrow the government" or "spreading counterrevolutionary propaganda and agitation" or both.⁸⁹

84. *Further on Sentencing of Wong Juntao, Others*, *supra* note 83, at 15.

85. *Id.*

86. *Rioter Trials "Basically Completed"*, BEIJING REV., April 15-21, 1991, at 6.

87. Nicholas D. Kristof, *China Sentences Eight Leading Dissidents*, N.Y. TIMES, Jan. 27, 1991, at 3.

88. *See Riot Offenders Get Sentences*, BEIJING REV., Jan. 14-20, 1991, at 7; *see also Beijing Sentences More Riot Offenders*, BEIJING REV., Feb. 4-10, 1991, at 5-6; *Four Sentenced for Roles in Turmoil*, BEIJING REV., Mar. 4-10, 1991, at 10; *Lawbreakers Involved in Riots Sentenced, Wang Dan, Seven Antigovernment "Offenders" Sentenced*, *supra* note 83; *Further on Sentencing of Wang Juntao, Others*, *supra* note 83.

89. *See Sheryl WuDunn, Seven Sentenced in First Tiananmen Square Protest Trials*, N.Y. TIMES, Jan. 6, 1991, at 3; *see also* Nicholas D. Kristof, *China Sentences Eight Leading Dissidents*, N.Y. TIMES, Jan. 27, 1991, at 3; *Nicholas D. Kristof, China Sentences Two of Its Dissidents to 13-Year Terms*, N.Y. TIMES, Feb. 13, 1991, at A1.

<u>Name</u>	<u>Charges</u>	<u>Sentence</u>	<u>Note</u>
Chen Ziming	Plotting to overthrow the government and counter-revolutionary propaganda and agitation	13 years	Not willing to repent
Wang Juntao	Same	13 years	Same
Ren Wanding	Counter-revolutionary propaganda and agitation	7 years	Refused to admit that he committed the crime
Liu Gang	Plotting to overthrow the government	6 years	Acknowledged his crimes and showed willingness to repent
Bao Zumxin	Counter-revolutionary propaganda and agitation	5 years	Repented
Wang Dan	Same	4 years	Showed repentance, confessing his own crimes and exposing others
Wang Youcai, Zhang Ming, Ma Shaotang	Same	2 to 4 years	
Kong Xianteng, Zhang Qianjin, Xue Jian'an	Charge not published, but a NCNA January 5, 1991, report indicated that they were accused of assembling crowds, undermining public order, and impeding the advance of martial law troops	2 to 3 years	
Guo Haiteng	Counter-revolutionary sabotage	4 years	
Yao Junling	Same	2 years	Confessed crime and showed repentance

The above sentences were announced on January 5, 26, and February 12, 1991. In order to gauge domestic and international reaction, the lenient verdicts were reported in early January. On January 28, 1991, U.S. State Department Spokeswoman Margaret D. Tutwiler commented on the

prison sentences of five defendants, finding “no evidence that their offenses consisted of more than a non-violent expression of political views,” and thus their sentences “would appear to violate the United Nations Universal Declaration of Human Rights, which guarantees the right of political expression.”⁹⁰ Tutwiler also stated that the absence of independent observers raised concerns about “whether these trials meet recognized standards of due process and fairness.”⁹¹ On February 12, 1991, after a Chinese court imposed thirteen year jail terms on Chen Ziming and Wang Juntao, spokeswoman Tutwiler charged that “no prison sentence imposed for non-violent political activity can be considered lenient.”⁹² She also commented that “the speed of the verdicts, the limited opportunity afforded defendants to prepare a defense and the inability of independent observers to attend the trials inevitably raises questions of justice, fairness, and due process.”⁹³

Since June 1990, the Chinese government has maintained the position that only 355 people were detained for the “counterrevolutionary rebellion” in June of 1989. As of mid-1991, 95 people were known to have either gone to trial or been released without trial. However, the fate of the remaining 240 acknowledged detainees remains unknown—as does the fate of thousands of other people who were arrested throughout China after the June 4, 1989 Tiananmen Square massacre.⁹⁴ Many believe that the Chinese govern-

90. *State Department Regular Briefing*, Federal News Service, Feb. 12, 1991, available in LEXIS, Nexis Library, Fednew File.

91. *U.S. Assails Sentences of Chinese Protesters*, N.Y. TIMES, Jan. 29, 1991, at A8.

92. *Id.*

93. Robert Benjamin, *China Sentences Two Dissidents to Jail for 13 Years*, BALTIMORE SUN, Feb. 13, 1991, at A2.

94. Nicholas D. Kristof, *Chinese Trials End; Fate of Hundreds Unclear*, N.Y. TIMES, Feb. 14, 1991, at A6. On February 28, 1992, China suddenly announced that it had handed down relatively short sentences, i.e., up to five years imprisonment, to up to 11 dissidents in connection with the Tiananmen Square demonstrations and subsequent pro-democracy protests, with no details of the trials given. A report in a Hong Kong newspaper on the same day suggested that China had closed all of the cases raised by the United States Department of State 1992 Human Rights Reports. China, however, has not provided information concerning approximately 12 other dissidents named in a list sent to China in November 1991 by

ment sentenced a great number of the pro-democracy movement's participants to reeducation through labor camps,⁹⁵ a punishment which—because it is not a criminal sanction under the Chinese legal system—allows the government to bypass all judicial procedures.

VII. CONCLUSION

Two significant aspects of the Chinese criminal justice system fall far short of minimum international standards. By permitting the use of analogy in defining what constitutes a criminal act, the Chinese system rejects the principle of no punishment without pre-existing law. Moreover, the Chinese Criminal Law is drafted in such general terms as to give the judge wide discretion in establishing the criminality of an act.

With respect to criminal procedure, the Chinese system refuses to accept the principle of presumption of innocence. And while the system accepts the right of defense, it excludes defense lawyers from the investigatory stage of prosecution. Limitations on the time allotted for preparation of a defense severely undermines the effectiveness of that defense.

Astonishingly, when the Chinese Communist authorities arrested many pro-democracy dissidents and held them for trial, the authorities failed to comply with their own established procedures.

Moreover, so-called “reeducation through labor” and similar administrative sanctions are in fact criminal sanctions imposed on an individual without a judicial trial, constituting a flagrant violation of the principles of criminal justice recognized by civilized nations.⁹⁶

Secretary of State James A. Baker, III. Sheryl WuDunn, *China Gives Light Sentences to Advocates of Democracy*, N.Y. TIMES, Feb. 29, 1992, at 3.

95. See AMNESTY INTERNATIONAL, *supra* note 62, at 38-48.

96. Cf. Universal Declaration of Human Rights, art. 10, G.A. Res. 217, *supra* note 13 (providing that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”). On April 4, 1989, an Administrative Litigation Act was promulgated, which entered into force on October 1, 1990. See Collection of Laws of the People's Republic of China in 1986, *supra* note 56, at 23-39. Article 11, paragraph 1, subparagraph 2, provides that a citizen may appeal to a people's court for a compulsory review of measures restricting

Finally, the Chinese government's assertion that human rights are exclusively the domestic concern of the state has no basis in modern international law. Article 55 of the United Nations Charter provides that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."⁹⁷ Article 56 provides that "[a]ll members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in article 55."⁹⁸ As a member of the United Nations and an adherent to the U.N. Charter, the People's Republic of China implicitly recognizes that "human rights referred to in it are a subject of international concern and, to that extent, no longer within its exclusive domestic jurisdiction."⁹⁹ Therefore, international concern over the Chinese treatment of its pro-democracy dissidents does not constitute interference in Chinese domestic affairs.

personal freedoms imposed by an administrative agency. *Id.* at 25. According to a PRC book, reeducation through labor decisions rendered by an administrative agency are now subject to judicial review. INFORMATION DEP'T, MINISTRY OF JUSTICE, ZHONGHUA RENMIN GONGHEGUO XINGZHENG SUSONGFA JIANGHUA [TALKS ON THE ADMINISTRATIVE PROCEDURE LAW OF THE PRC] 25-26 (1990). On October 16, 1990, a people's court accepted a case challenging an administrative decision to subject a person to reeducation through labor. However, before the court rendered its judgment, the decision on reeducation through labor was cancelled by an administrative agency, so the court dismissed the case. A member of the court considered that reeducation through labor decisions may be reviewed by a people's court according to the above-stated provisions of the Administrative Litigation Act. See Chen Tianyuan, *My View on Trying an Administrative Case Challenging [a Decision on] Reeducation Through Labor*, FAXUE ZAZHI, No. 4, 1991, at 47.

97. U.N. CHARTER art. 55.

98. *Id.* art. 56.

99. THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 21-22 (1988).

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